UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

MARY ESTER MACFARLANE, individually and as the Administrator of the Estate of D. KENNETH MACFARLANE, PATRICK MACFARLANE, SCOTT MACFARLANE, CHRISTOPHER MACFARLANE, and KELLY GILL, Plaintiffs,	:	
v.	:	Docket No. 1:99-cv-100
CANADIAN PACIFIC RAILWAY COMPANY, as successor in interest to Delaware & Hudson Railroad, and NATIONAL RAILROAD PASSENGER CORPORATION, Defendants.	:	

RULING ON DEFENDANT'S MOTION TO LIMIT RECOVERY
(Paper 99)

Defendant, National Railroad Passenger Corporation ("Amtrak"), filed a Memorandum of Law Regarding Recovery in this Action, which the Court construes as a Motion to Limit Recovery. (Paper 99) Amtrak seeks to limit recovery to the subrogation interests of Farm Family Casualty Insurance Company ("Farm Family"), arguing Farm Family is the sole real party in interest and the MacFarlanes can recover nothing. In the alternative, Amtrak argues any recovery by the MacFarlanes should be limited by the arbitration award. (Paper 99 at ¶ 13)

Plaintiffs oppose, arguing the MacFarlanes have a right to recovery unfettered by the prior arbitration award. For the reasons set forth below, Defendant's motion is DENIED in part and GRANTED in part.

BACKGROUND

This action results from an accident at a railroad highway grade crossing in Putnam, New York on January 19, 1997 that killed the vehicle's driver, Gregory Kean, and his passenger, D. Kenneth MacFarlane. The facts underlying the accident are set forth in previous decisions of this Court (Papers 36 and 44), and familiarity with these facts is assumed. For purposes of this motion, however, brief recitation of the procedural history is necessary.

After the accident, the MacFarlanes recovered the policy limit of $100,000 from the insurance carrier for Gregory Kean. Next they sought to recover underinsured motorist benefits ("UIM benefits") from Farm Family through arbitration in accordance with their contract of insurance. Represented by counsel, the MacFarlanes presented evidence of claimed damages in excess of $1,200,000. The arbitration award was $405,150.50, of which Farm Family paid $300,000.

Following arbitration, Farm Family sought recovery for damages paid to the MacFarlanes. Farm Family brought suit

pursuant to V.R.C.P. 17(c), which allows an insurer to file a subrogation action in the name of the insured, provided the insurer gives notice of subrogation and allows the insured an opportunity to join the action. Pursuant to V.R.C.P. 17(c), Farm Family served the administratrix of Mr. MacFarlane's estate with an "Insurer's Notice of Subrogation" notifying her that Farm Family intended to seek recovery of its subrogation interest in their name and informing them of the ten-day window to join the action. The notice stated:

> You are hereby notified pursuant to V.R.C.P. 17(c) that the undersigned intends to commence an action in your name for wrongful death damages sustained by you on or before January 19, 1997, and for which you have been wholly or partially reimbursed by the undersigned. If you and your spouse or dependents sustained personal injury or other loss as a result of said occurrence and you wish to file suit therefore, Rule 17(c) of the Vermont Rules of Civil Procedure requires you to notify the undersigned in writing of your intention to do so within 10 days of the date of your receipt of this notice.

(Paper 118, Ex. A)

The record shows counsel for the MacFarlane family received the notice of subrogation. (See id.). Notably, there was no response to the notice, and as a result Farm Family initiated an action in state court in the MacFarlanes' name with a copy of the subrogation notice attached to the complaint as required by Rule 17(c). Thereafter, the case was removed to this Court with the caption unchanged.

At no time did the MacFarlanes file a motion to intervene or otherwise properly join the action in this Court. Instead, a Notice of Association of Counsel was filed on August 13, 2002, indicating Farm Family would associate with the MacFarlanes' counsel. At this time, Plaintiffs claim the MacFarlanes "assumed control of the case." (Paper 121 at 2)

Despite several years of litigation, however, the issue did not arise with regard to the real party in interest and whether the MacFarlanes are merely a party in name only. (See Paper 124) The Court directed the parties to submit memoranda as to who is the real party in interest, and to show cause why Farm Family should not be captioned as the plaintiff pursuant to F.R.C.P. 17.

DISCUSSION

Rule 17 requires that "every action shall be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). The effect of this rule is that "the action must be brought by the person who, according to the governing substantive law, is entitled to enforce the right." 6A C. Wright & A. Miller, Federal Practice and Procedure §§ 1543-1544 (2d ed. 1990). The complaint includes a claim against Amtrak for wrongful death. (Paper 9 at ¶ 23) Under Vermont law, a decedent's spouse and next-of-kin can recover damages

resulting from wrongful death. See Vt. Stat. Ann. tit. 14, § 1492(c). This seems to suggest the MacFarlanes qualify as a real party in interest.

However, the substantive law also contains a statute of limitations requiring that wrongful death actions be brought within two years. 14 V.S.A. § 1492(2). Throughout their submissions to this Court, Plaintiffs concede the MacFarlanes were not parties to the original action filed in state court and further concede they did not join until "well beyond the filing of the action by Farm Family in their name." (Paper 121 at 9; Paper 127 at ¶ 5) The relevant question, then, is whether the MacFarlanes joined prior to the expiration of the statute of limitations on January 19, 1999.

Although Plaintiffs concede the MacFarlanes did not join the litigation until "well beyond the filing," they do not indicate a date on which the MacFarlanes joined. Instead, they point to August 13, 2002, the date on which the MacFarlanes' attorney filed a Notice of Association of Counsel, and claim this date marks when the MacFarlanes "assumed control of the case." It is unclear, though, how a party that admittedly was not part of the action as filed and never properly joined can "assume control of the case" and share in recovery. In any event, despite Plaintiffs' ambiguous language, it appears the MacFarlanes did not join

the action prior to January 19, 1999 when the statute of limitations expired. In fact, as mentioned above, the parties concede the MacFarlanes did not join until "well beyond the filing" in state court, which occurred on January 8, 1999, a mere 11 days prior to the deadline.

The inclusion of the MacFarlanes in the caption is nothing but a fiction authorized by Vermont Rule of Civil Procedure 17(c), which allows an insurer to seek its subrogation interest by suing in the name of the insured. The record demonstrates the MacFarlanes, despite receiving the Notice of Subrogation, chose not to join Farm Family's action and that Farm Family filed suit solely on its own behalf, with the MacFarlane family a party in name only. It was not until August 13, 2002, that the MacFarlanes attempted to assume control of the case and join the action. This attempt, however, came long after the expiration of the statute of limitations. Accordingly, under the governing substantive law, the MacFarlanes are not entitled to enforce any right with respect to the wrongful death claim and thus do not qualify as a real party in interest.

The analysis does not end here, however, because Plaintiffs argue any objection to real party in interest status has been waived by Amtrak. (Paper 126 at 5)

B. Waiver

Any objection alleging the plaintiff is not the real party in interest "should be done with reasonable promptness" or else a court may conclude the point has been waived by the delay. See Int'l Meat Traders, Inc. v. H & M Food Systems, 70 F.3d 836, 840 (5th Cir. 1995)(quoting 6A C. Wright & A. Miller, Federal Practice and Procedure § 1554 (2d ed. 1990)). Amtrak insists "it was not until recently that Amtrak had any reason to understand that recovery was sought beyond the subrogation interests of [Farm Family]." (Paper 99 at 1-2) This assertion is unconvincing in light of the Notice of Removal filed five years ago, in which Amtrak expressly construes the MacFarlanes as plaintiffs. (Paper 1 at ¶¶ 4,6) In fact, Amtrak's removal to this Court was based on what it perceived as a wrongful death claim brought by Mary Ester MacFarlane, which met the $75,000 amount in controversy requirement. (Id.)

Considering Amtrak construed the MacFarlanes as plaintiffs during the initial stages of this action yet waited until the eve of trial nearly five years later to remove them as claimants, the Court concludes Amtrak did not raise its objection with reasonable promptness. See, e.g., Whelan v. Abell, 953 F.2d 663, 672 (D.C. Cir. 1992)(holding that real party in interest defense is waived when made as late as the

start of trial); Gogolin & Stelter v. Karn's Auto Imports, Inc., 886 F.2d 100, 102-03 (5th Cir. 1989)(assertion during trial is untimely); Hefley v. Jones, 687 F.2d 1383, 1388 (10th Cir. 1982)(assertion 16 days before trial is untimely). Thus, the defense has been waived.

C. Effect of Prior Arbitration

In the alternative, Amtrak argues any recovery by the MacFarlanes should be limited to the balance of the arbitration award. (See Paper 99 at ¶ 13; Paper 123 at 6-9) According to this argument, the damages determination resulting from arbitration between the MacFarlanes and Farm Family precludes the MacFarlanes from relitigating damages in the present action against Amtrak. This argument has merit.

First, a valid final arbitration award is in the same nature as a judgment of a court and thus has the same force and effect under the rules of res judicata and collateral estoppel. See Agway v. Gray, 167 Vt. 313, 316-17 (1997). Therefore, an arbitration award precludes parties from again litigating the same issues. See id. The absence of Amtrak in the prior arbitration proceedings does not change the binding effect of the arbitration on the MacFarlanes in this action. The Vermont Supreme Court has rejected the "mechanical use of the mutuality requirement" in applying collateral estoppel.

Trepanier v. Getting Organized, Inc., 155 Vt. 259, 266 (1990). Instead, the key inquiry is "whether the party to be bound has had a full and fair opportunity to contest an issue resolved in an earlier action so that it is fair and just to refuse to allow that party to relitigate the same issue." Id.; see also Agway, 167 Vt. at 317.

In Agway, the court concluded the plaintiff had a full and fair opportunity to contest certain damages because he acceded to arbitration, was represented by counsel, presented evidence, and cited both facts and law in support of his claim. Id. These same factors are all present in this case. (See Paper 99, Ex. 2) Consequently, the MacFarlanes had a full and fair opportunity to contest damages at arbitration, and they are now bound by the damages determination that resulted.

Plaintiffs invoke 23 V.S.A. § 941(e) and claim the statute contemplates the scenario in which the UIM insurer and the injured party jointly pursue a tortfeasor for their respective interests after the injured party has been paid UIM benefits. (Paper 108 at 2-3) This assertion is correct; however, it overlooks the effect of a prior proceeding in which an aggrieved party's damages are determined. Specifically, the statute does not insulate a party from collateral estoppel after that party has had an adequate

opportunity to contest damages in an earlier proceeding, whether it be arbitration or judicial in nature. Consistent with 23 V.S.A. § 941(e), the MacFarlanes and Farm Family can still jointly pursue Amtrak for their respective rights; the MacFarlanes, however, are bound by a determination of damages from a prior proceeding.

CONCLUSION

Defendant's Motion to Limit Recovery is DENIED in part and GRANTED in part. Members of the MacFarlane family named as Plaintiffs qualify as real parties in interest; however, any recovery by them is limited by the determination of damages from their prior arbitration proceeding.

SO ORDERED.

Dated at Brattleboro, Vermont this ___ day of May, 2004.

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J. Garvan Murtha, U.S. District Judge